NO. 80-673

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WALTER TAYLOR,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT AND/OR COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT, STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the question of Petitioner's being denied the identity of the informer who observed Petitioner selling a controlled substance, diazapam, is within the jurisdiction of the Supreme Court where this issue was never presented to the highest court of the State of Alabama and was thus never reviewed by it.

2. Whether the question of Petitioner's being denied the right to introduce certain evidence at trial to prove alibi while the prosecution was allowed to impeach his testimony with questions regarding his alleged alibi is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State of Alabama and was thus not reviewed by it.

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MISCELLANEOUS:

Alabama Rules of Appellate Procedure Rule 39(k)	6,7,8
28 U.S.C. §1257	2,4,

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OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals in this case have not yet been reported but appear in Petitioners Appendix with the denial of certiorari by the Alabama Supreme Court.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257, and has presented two separate issues for consideration. It is Respondent's position that this Court is without jurisdiction to consider either issue asserted since neither was ever properly presented to the highest court of the State and was therefore not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

Respondent hereby adopts by way of reference the Petitioner's Statement of the Case as being substantially correct.

REASONS FOR DENIAL OF THE WRIT

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW AN ISSUE WHICH HAS NEVER BEEN PRESENTED OR REVIEWED BY THE STATE'S HIGHEST COURT.

On January 29, 1980, the Petitioner filed a brief and argument with the Alabama Court of

Criminal Appeals pursuant to his appeal of his conviction in the Circuit Court of Shelby County, Alabama. The Alabama Court of Criminal Appeals affirmed the conviction without rendering an opinion, and on April 14, 1980, the Petitioner applied for a rehearing in the Court of Criminal Appeals. The rehearing request was denied on April 22, 1980, and thereafter on May 5, 1980, the Petitioner petitioned for a writ of certiorari with the Alabama Supreme Court. The writ was denied on October 1, 1980.

The first issue asserted by the Petitioner's present petition to this Honorable Court concerns the trial courts refusal to require disclosure of the identity of an informer who allegedly witnessed the transaction that served as the basis of the criminal charge against the Petitioner. However, the Respondent respectfully points out to this Court that at no point in the state appellate process, as recited in the previous paragraph, did the Petitioner ever attempt to raise this issue or one closely similiar.

Therefore, the Petitioner is for the first time raising this particular issue and the Respondent respectfully argues that this Court is without jurisdiction to review such an issue.

It is provided in 28 U.S.C. §1257 that this Court's certiorari jurisdiction extends only to final judgments or decrees that are rendered by the highest Court of the state in which a decision should be had. This position has been adhered to by this Court in the two recent cases of Street v. New York, 394 U.S. 576, 22 L. Ed 2d 572, 89 S.Ct. 1354 (1969), and Michigan v. Tyler, 436 U.S. 499, 56 L. Ed 2d 486, 98 S.Ct. 1942 (1978). In Street v. New York, supra, it was held that if the question is not presented to the State courts in such a manner that it is decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Conclusion, the Respondent argues that the first issue asserted by the Petitioner has never been presented to the Alabama appellate court system in any manner. Therefore, the writ should be denied as to the first issue due to the absence of jurisdiction of this Court over that issue.

2. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW AN ISSUE WHICH HAS NOT PROPERLY BEEN PRESENTED TO AND REVIEWED BY THE STATE'S HIGHEST COURT.

On April 1, 1980, the Alabama Court of Criminal Appeals affirmed, without an opinion, Petitioner Taylor's conviction in the Shelby County Circuit Court. On April 14, 1980, Petitioner applied for a rehearing which was denied without opinion, by the Court of Criminal Appeals on April 22, 1980. Thereafter, Petitioner petitioned for a writ of certiorari in the Supreme Court of Alabama, and that petition was also denied without opinion.

Pursuant to Rule 39(k), Alabama Rules of Appellate Procedure (ARAP), the scope of review of the Supreme Court of Alabama is ordinarily limited to the facts stated in the opinion of the Court of Criminal Appeals. Petitioner's Application for Rehearing on April 14, 1980, failed to follow correct procedural law in a "No Opinion" affirmance and did not invoke Rule 39(k) in his application requesting the Court of Criminal Appeals to issue an opinion or statement of the facts of the case. The Alabama Supreme Court has consistently held that in the absence of a petitioner invoking Rule 39(k) ARAP in a "No Opinion" affirmance the petition is due to be stricken and the writ will be denied. See: Adams v. State, 362 So. 2d 654 (Ala. 1978); and Deerman v. State, 370 So. 2d 1107 (Ala. 1979). In Adams v. State, supra, the Alabama Supreme Court stated:

> "The Petition for Writ of Certiorari requests this Court to review a "No Opinion" affirmance by the Court of Criminal Appeals, Ala. App., 363 So. 2d 654, with the judgment of conviction and sentence ordered by the trial court. Petitioner does not invoke Rule 39(k), ARAP. Thus, the writ is denied."

The second federal question asserted by the Petitioner was not expressly passed on by the highest state court, due to a failure to conform to state procedure. As quoted earlier, in Street v. New York, 394 U.S. 576, 22 L. Ed 2d 572, 89 S.Ct. 1354 (1969), this Court said that if the question is not presented to the state courts in such a manner that it is decided by the highest court of the state when it affirms the conviction, then the Supreme Court has no power to consider the matter. Michigan v. Tyler, 436 U.S. 499, 56 L. Ed 2d 486, 98 S. Ct. 1942 (1978), held in accord with this same point.

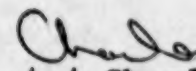
In Conclusion, the Petitioner presented nothing on this second issue before the Alabama Supreme Court for review. As stated earlier

with cited authorities, the Alabama Supreme Court will not review the merits of a "No Opinion" affirmance where the petitioner does not follow state procedural rules, Rule 39(k), ARAP, respectfully. Therefore, the highest state court has never reviewed the issue at hand.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



/s/ Charles A. Graddick
CHARLES A. GRADDICK
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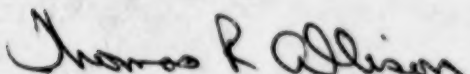
ALABAMA



/s/ Thomas R. Allison
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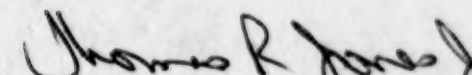

/s/ Thomas R. Jones, Jr.
THOMAS R. JONES, JR.
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of January, 1981, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama on each attorney for petitioner by placing same in the United States mail, postage prepaid and properly addressed as follows:

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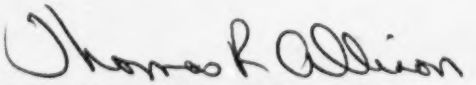

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